United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2032

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD DAVID,

Petitioner-Appellant,

-against-

J.W. PATTERSON, Superintendent, Eastern Correctional Facility,

Respondent-Appellee.

Docket Number 76-2032

B
P/S

REPLY BRIEF FOR
PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

POINT I

APPELLANT'S STATEMENTS TO SECURITY OFFICER BARCENE WERE NOT SPONTANEOUS, AND THEY WERE ADMITTED OVER HIS OBJECTION, NOT AT HIS REQUEST.

In Appellant's Brief at Point IA it is argued that appellant's inculpatory statement to the C.C.N.Y. Security Officer should be suppressed, since the Security Officer was required to afford appellant Miranda warnings and no warnings were given.

Additionally, appellant argued that the State Court erred by failing to afford him a hearing on the confession as required by Jackson v. Denno, 378 U.S. 368 (1964).

Rather than respond directly to either of these claims, Respondent argues that no matter what the status of the Security Officers, appellant's statements were admissible, either 1) because petitioner's statement "was clearly an unsolicited volunteered remark" (Respondent's Brief at 10); or 2) because it was petitioner's trial counsel "who insisted on bringing all the statements out before the jury" (Respondent's Brief at 13). Neither claim withstands even cursory analysis.

A

The record as a whole is replete with explicit statements by Officer Barcene that appellant's statement, rather than being spontaneous, was uttered in direct response to questions posed by Security Officer Barcene during interrogation which began "immediately" after appellant's arrival, in handcuffs, at the Security Office and which continued for up to 25 minutes (222, 228, 230, 207).*

Thus, the following sequence, in cross-examination of Officer Barcene:

> Q Now, before he made this alleged statement, did you ask him any questions?
>
> A No.

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* Numbers in parenthesis refer to pages of State Court trial minutes, before this Court as part of the Supplemental Record on Appeal.

Q He just told you that without --

A I asked him that.

Q What did you ask him?

A I asked him did you ever mug any other students.

(228)

And if there were any doubt about what Officer Barcene meant by his words, he rearticulated them only two pages later, in the following statement:

Q Before he gave you that alleged statement, what did you say to him?

A Asked him for his name.

Q What else?

A His address.

Q What else?

A And that's about it. Then I asked him that question.

Q You asked him what?

A I asked him that question. Did he mug any other students?

Q You asked him did he mug any other students?

A Yes.

Q And, he told you he's done that before?

A Right.

(230)

These references make it abundantly clear that appellant's statement were not volunteered, but instead were uttered in response to direct questioning initiated by Officer Barcene. And, there is even more evidence that custodial in-

terrogation took place here. Security Officer Murray indicated that appellant was taken in a separate room and interrogated for twenty-five minutes (207), and there is no dispute that appellant was handcuffed when the C.C.N.Y. officers took him into custody (182, 215). The evidence that custodial interrogation took place is inescapable.

Respondent's brief is devoid of any citation to the record which even suggests, let alone states, that appellant's statements were volunteered, unsolicited or uttered pursuant to a conversation initiated by appellant (see Respondent's Brief at 8, 10-11), nor does any such statement appear in any portion of the trial record. We assume, however, from the citations on Page 8 of Respondent's Brief that their belief that the statements were volunteered is drawn from the following colloquy at pages 225-226 of the trial record, which occurred immediately after the Court refused appellant's request to suppress Barcene's testimony:

> BY MR. ANDREWS:
>
> Q Mr. Barcene, we're talking about the conversation you had with him immediately upon your arrival at the college security office.
>
> A Yes.
>
> Q Without telling us the entire conversation, will you please tell us the statement, if any, that the defendant made to you? Regarding the incident.
>
> MR ZUCKERMAN: May I note an objection on the record?
>
> THE COURT: Yes, you have an objection. Go ahead.

BY MR. ANDREWS:

Q As already indicated --

THE COURT: You may answer the question.

A I asked him --

BY MR. ANDREWS"

Q Not what you asked him, just what he said to you.

A He was lucky he got --

MR. ZUCKERMAN: May I ask he tell us everything?

THE COURT: You've have opportunity to.

MR. ANDREWS: If counsel wants him to --

MR. ZUCKERMAN: No, I want to. I made --

MR. ANDREWS: I did it out of deference to the defendant.

THE COURT: You may cross examine. Go ahead, answer.

BY MR. ANDREWS:

Q What did he say to you?

A Lucky I go caught.

Q What?

A He was lucky he got caught because he had done some before.

MR. ZUCKERMAN: I couldn't hear it.

BY MR. ANDREWS:

Q What did he say?

MR. ZUCKERMAN: What did he say?

A He was mugging people before, he was just lucky he got caught. In other words, he had mugged before people but he just -- unfortunately he got caught now.

(225-226) (Emphasis supplied)

Not only is there nothing in this sequence even remotely hinting that appellant's statement was volunteered, but Barcene's testimony actually confirms the portions of cross-examination previously cited where the officer testified that appellant's answers were in response to questions initiated by the officer. Thus, Barcene began his recitation by stating, "I asked him . . . " While the officer was cut short by the District Attorney and directed to confine himself to the answers given by appellant, his statement corroborates his later explicit assertions that he initiated the questioning. At any rate, Respondent's conclusion that this sequence "indicates that petitioner initiated a casual conversation" (Respondent's Brief at 12) is palpably absurd when it is remembered that Barcene had been ordered by the District Attorney to discuss only appellant's answers, not Barcene's questions.

In sum, the record conclusively shows that rather than spontaneously offering his admissions, appellant was replying to specific questions posed by Barcene in a police-dominated interrogation (207, 222, 228, 230).* There is simply not a shred of evidence supporting Respondent's lame asser-

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* The State cases relied upon by Respondent are entirely inapposite. In People v. Kaye, 25 N.Y. 2d 139 (1969), appellant's statement was not only unsolicited, but it followed Miranda warnings. In People v. Robles, 27 N.Y. 2d 155 (1970), the Miranda issue was not even before the Court, having been resolved by affirmed findings of fact by the lower Courts. Moreover, Robles has recently been explicitly overruled by the New York Court of Appeals. People v. Hobson, ___ N.Y. 2d ___ (May 4, 1976). Finally, People v. Torres, 21 N.Y. 2d 49 (1967), involved a situation where a defendant not only volunteered a statement before the officer could ask a single question, but may not even have been in custody.

tion that this statement was volunteered.*

B

Even less supportable is Respondent's claim that it was somehow petitioner's fault that the statements were brought before the jury.

Respondent's claim totally ignores the fact that well before Barcene's testimony appellant had moved for an evidentiary hearing to determine whether the statements should be suppressed. In addition, he moved to suppress the statements when offered.

After the trial Court denied both of these motions, the prosecutor began eliciting from the security guard the incriminating statements appellant had allegedly made, while instructing the guard not to recount the questions he had asked appellant to elicit these statements. It was only then that defense counsel insisted that the guard should "tell us everything."**

It is this request by defense counsel which the State excerpts from the transcript as the basis for its claim that appellant waived his objection to the introduction of at least some of his alleged confession. This claim of waiver is obviously

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* Moreover, the most Respondent can possibly gain by its claim is a remand for a hearing. Appellant has alleged detailed factual allegations which, if proved, entitle him to relief. Respondent's allegations, at best, create an issue of fact which, because no previous confession hearing was held, requires an evidentiary hearing (Townsend v. Burke, 372 U.S. 293 (1963)). Indeed, Respondent has never contested appellant's assertion that the State Courts erred by failing to grant appellant a Huntley Hearing. See Jackson v. Denno, 378 U.S. 387 (1964).

** See colloquy, pages 225-226 in record of State trial, reproduced at 4-5, supra.

frivolous both legally and factually. Legally, defense counsel preserved his objection to this evidence by repeatedly seeking its suppression. Factually, it was the prosecutor, not defense counsel, who introduced the alleged statement to the jury. Defense counsel, in asking that the security guard "tell us everything," was clearly not consenting to the introduction of the alleged confession or of any other incriminating statements. Rather, given the erroneous denial of his earlier suppression motions, defense counsel was only urging that if the incriminating statements were to be admitted, they should be presented to the jury in the context of the interrogation in which they were elicited, so that the jury could judge their voluntariness.

Finally, Respondent's position is rendered even more untenable by the simple fact that the Court refused to grant counsel's request that the officer tell "everything," and ordered counsel to wait until cross-examination to pursue his questions. Indeed, the entire substance of appellant's statement to Barcene was related during the officer's direct examination* (224-227).

The record lends no support to either of Respondent's claims, which accordingly should be rejected by this Court.

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* Respondents' claim that the prosecutor was trying to limit appellant's statements, admitting some and excluding others, in contradicted not only by what the prosecutor did, but by his statement prior to trial, "Now I hope to offer that entire statement to the jury . . . " (59).

CONCLUSION

FOR THE ABOVE-STATED REASONS AND THE REASONS STATED IN APPELLANT'S MAIN BRIEF THE WRIT OF HABEAS CORPUS SHOULD BE GRANTED.

Respectfully submitted,

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June 9, 1976

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CERTIFICATE OF SERVICE

June 9, 1976

I certify that a copy of this brief ~~and appendix~~ has been ~~mailed to~~ personally delivered to the Attorney General of the State of New York.

David R. Goldfein